Del. Op. Atty. Gen. 95-FB01 (Del.A.G.), 1995 WL 794524 (Del.A.G.)

Office of the Attorney General

State of Delaware
Opinion No. 95-FB01
September 29, 1995

Re: Enforceability of 15 Del. C. § 8021 and § 8023

*1 The Honorable Thomas J. Cook
Civil Division--New Castle County
Office of Commissioner of Elections
32 Loockerman Square
Suite 203
Dover, DE 19901

Dear Commissioner Cook:

You have asked whether 15 Del. C. § 8021 and 15 Del. C. § 8023[1] are still enforceable in light of McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S.Ct. 1511 (1995). For the reasons stated below, we believe that these two sections of the Delaware Code which require identification of the person or organization paying for campaign literature or advertising would likely be held to violate the freedom of speech provision of the First Amendment of the United States Constitution under the decision in McIntyre.

In McIntyre, Mrs. McIntyre distributed leaflets against a tax referendum and failed to identify on the leaflet who paid for such advertising as required by the Ohio statute, which is similar to 15 Del. C. § 8021 and § 8023(a).

The Supreme Court, following its holding in Talley v. California, 362 U.S. 60, 64 (1960) that "anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind" held that:

Whatever the motivation may be, at least in the field of literary endeavor, the interest of having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
McIntyre, 115 S.Ct. at 1516.

The Court went on to hold "[t]he specific holding in Talley related to advocacy of an economic boycott but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes." Id. at 1517.

Although the obvious rationale for 15 Del. C. § 8021 and § 8023 is the prevention of the distribution of false or misleading advertising and to inform the public of the source of the advertising, the Supreme Court in McIntyre dealt with both those reasons and found them wanting. The Court first noted that the State of California in Talley had made the argument that the disclosure requirement was necessary to prevent false or fraudulent advertising or libel. The Court rejected that argument on the basis that there is nothing in the statute limiting its effect to those evils, quoting from Justice Harland's concurring opinion in Talley:

But the ordinance is not so limited, and I think it will not do for the state simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. (Citations omitted.)

*2 Id. at 517, n. 7.

The Court in McIntyre differentiated the requirement of disclosure on political material from the cases that dealt with the voting process itself. It held that, unlike those cases (Anderson v. Celebrese, 460 U.S. 780 (1983) and its progeny) in which the Court adopted a "reasonable" and "nondiscriminary burden" on the rights of voters standard, the Court in McIntyre rejected this test and held that a requirement of disclosure impacts pure speech and therefore, "involves a limitation of political expression subject to exacting scrutiny." Id. at 1518 quoting Meyer v. Grant, 486 U.S. 414, 420, 108 S.Ct. 1886, 1891, 100 L.Ed.2d 425 (1988). The Court held "[i]ndeed, as we have explained on many prior occasions, the category of

speech regulated by the Ohio statute occupies the core of protection afforded by the First Amendment.... The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" Id. at 1518-1519 (citations omitted).

Therefore, the Court stated "[n]o form of speech is entitled to greater constitutional protection than Mrs. McIntyre's. When a law burdens core political speech, we apply 1995 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." (Citation omitted.) Id. at 1519.

When considering Ohio's argument that such a statute prevents fraud and libel, the Court held that Ohio had a specific election statute prohibiting false statements, and in addition, the courts could enforce libel laws under common law torts. Therefore, the Court held "[a]lthough these ancillary benefits are assuredly legitimate, we are not persuaded that they justify § 3599.09(A)'s extremely broad prohibition." Id. at 1520-1521. See also id. at 1521, n. 13.

The Court then went on to discuss that the Ohio statute was overbroad because it encompassed not only false speech but all speech and documents, including independent speech. Id. at 1521. Likewise, 15 Del. C. §§ 8021, 8023 would likely fail because they are overbroad in that they cover all speech, not just false speech. Id. at 1522, see also n. 16.

The Court, in addressing the argument of Ohio that such disclosure was required to provide information to the electorate held,

[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer makes statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author adds little, if anything, to the reader's ability to evaluate the document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement. (Emphasis added.)

*3 Id. at 1520.

Further, the Court in McIntyre distinguished the requirement to disclose the author of campaign literature from the requirement (upheld in Buckley v. Valeo, 424 U.S. 1 (1976)) of disclosure of the sources of contributions to the Federal Election Commission. The Court distinguished Buckley, upholding an interest in avoiding the appearance of corruption and because it was a more narrowly drawn statute. The Court held that the Ohio statute was more intrusive on speech than the contribution disclosure requirements in Buckley and that it rested on "different and less powerful state interests." In essence, the Court was saying that the requirement that a campaign disclose its contributors serves a different interest and is more narrowly drawn than a statute like Ohio's, which is open ended to include all speech. Id. at 1523-1524.
Delaware's statutes, like the statute struck down in Ohio cover all campaign literature and advertising, whether true or false. Therefore, it is not narrowly tailored. Further, Delaware, like Ohio, has libel laws which can be enforced. Also, although Delaware's statutes are mostly associated with candidate campaigns, 15 Del. C. § 8021 contains no language limiting it to candidate campaigns and it is, at least arguably, equally applicable to referenda. In any event, there is nothing in the holding in the majority opinion in McIntyre to suggest that the Supreme Court's opinion would be any different in a case involving a candidate committee or independent advertising for candidates.[2]

Accordingly, unless and until McIntyre is limited by subsequent case law, we believe it must be read to encompass statutes such as 15 Del. C. § 8021 and § 8023 and believe that such statutes are, at present, unenforceable. We, therefore, advise, effective immediately, that you no longer attempt to enforce the statute to the extent it requires the identification of the person(s) responsible for such campaign literature, or advertising, which the Supreme Court has held to be "pure political speech." We also advise that, based on our opinion as stated herein, we will not enforce these requirements by means of criminal prosecutions under 15 Del. C. § 8043(b).

If you have further questions, please do not hesitate to contact us.
Very truly yours,

Michael J. Rich
State Solicitor
Malcolm S. Cobin
Assistant State Solicitor

APPROVED:

M. Jane Brady
Attorney General

Footnotes

1 § 8021. Identification of purchaser.

All campaign literature or advertising, except on items with a surface of less than 9 square inches, shall display prominently the statement: "Paid for by (name of political committee or other person paying for such literature or advertising)."

§ 8023. Independent expenditures.

(a) All campaign literature, advertising (except on items with a surface of less than 9 square inches) or other message paid for by independent expenditures shall prominently and at all times display the following statement: "Paid for by (name of person paying for the literature, advertising or other message). Not authorized nor paid for by any candidate or by any committee of any candidate. The cost of presenting this message is not subject to any campaign contribution limits." If the independent expenditure is made or reimbursed by a political action committee or other person other than an individual, the names of the president (or other chief officer) and treasurer of the such organization shall be prominently displayed with the rest of the above statement.

2 There is language in Justice Ginsberg's concurrence which suggests such a difference but there is nothing in the majority opinion indicating that it would adopt such a distinction. Justice Ginsberg stated: "We do not thereby hold that the State may not in other larger circumstances, require the speaker to disclose its interest by disclosing its identity." Id. at 1524.

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